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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM M. MARS, Defendant and Appellant.	C060077 (Super. Ct. No. 07F06352)
THE PEOPLE, Plaintiff and Respondent, v. WILLIAM M. MARS, Defendant and Appellant.	C060417 (Super. Ct. No. 07F06352)

Defendant William M. Mars pled no contest to two counts of lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288, subd. (a)),¹ and one count of committing a

¹ Undesignated statutory references are to the Penal Code.

lewd and lascivious act upon a child under the age of 14 by use of force or duress (§ 288, subd. (b)(1)), both against the same young family member, in exchange for dismissal of seven other molestation charges against other victims, and a stipulated prison sentence of 18 years.

On appeal,² defendant challenges the court's order that he submit to testing for the human immunodeficiency virus (HIV), pursuant to section 1202.1. We agree that there was insufficient evidence to support the court's implied finding, required under section 1202.1, subdivision (e)(6)(A), that there was "probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV ha[d] been transferred from the defendant to the victim." Consistent with the Supreme Court's holding in *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*), we shall reverse the judgment, vacate the testing order, and remand the matter for the limited purpose of permitting a further hearing on the issue of HIV testing at the election of the prosecution.

FACTS AND PROCEDURAL BACKGROUND

This appeal concerns only the legal question of whether the court erred in ordering defendant to submit to mandatory HIV

² Two identical appeals were inexplicably generated from the same superior court case, appeal Nos. C060077 and C060417. The appeals have been ordered consolidated.

testing, pursuant to section 1202.1. We therefore present a short summary of the facts as taken from the probation report.

The victim in counts one, two and three is defendant's adolescent step-granddaughter. The probation report contains her report of the following incidents of which defendant was convicted:

Defendant first touched her private area when she was 12 years old. He rubbed her back and butt through her clothes while she was sleeping on her stomach, then pulled her pants (but not underwear) down to mid-thigh, put his hands between her legs and rubbed the inside of her legs on top of her pants. She did not think she could get away because he was using his hand to hold her down.

He touched her again while she was 12, rubbing her back, butt and thighs on top of her clothes while her brother slept in the same room.

The probation report also recites that the victim twice saw defendant touch or massage his privates through his clothes, and he sent her notes in which he expressed a desire to have sex with her.

The reports of two other female family members, who were the victims in dismissed counts four through ten, are similarly reflected in the probation report. One reported that defendant had come into her bedroom at night 20 to 30 times: each time he would feel her breasts and her privates with his hand, "skin to

skin," while she pretended to be asleep. The other victim told police he had once touched her breasts and digitally penetrated her vagina, and threatened to hurt her if she didn't "shut up."

After defendant entered his no contest plea, the court found probable cause to believe that a possible transfer of bodily fluid took place between the defendant and the victim, and ordered defendant undergo testing for the HIV virus pursuant to section 1202.1.

DISCUSSION

Defendant's sole contention on appeal is that the court committed sentencing error by ordering him to undergo an HIV test pursuant to section 1202.1, because there was insufficient evidence to support this order. For the reasons that follow, we agree.

There is a general statutory prohibition against involuntary testing for HIV. (See Health & Saf. Code, § 120990.) Involuntary testing is thus "strictly limited by statute. [Citations.]" (*People v. Guardado* (1995) 40 Cal.App.4th 757, 763.) Section 1202.1, subdivision (a), requires that the court order HIV testing of persons convicted of certain sexual offenses enumerated in subdivision (e) of the statute. In the case of the conviction for an offense of lewd and lascivious conduct with a child (§ 288), the court shall order HIV testing "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid

capable of transmitting HIV has been transferred from the defendant to the victim.” (§ 1202.1, subd. (e)(6)(A)(iii).) The statute directs a court ordering such testing to “note its finding on the court docket and minute order if one is prepared.” (§ 1202.1, subd. (e)(6)(B).)

Although defense counsel does not appear to have objected to the order for HIV testing, he did not forfeit his sufficiency-of-the-evidence challenge to the testing order. (*Butler, supra*, 31 Cal.4th at p. 1123.)

The standard of probable cause here is an objective one: “Probable cause is an objective legal standard--in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.” (*Butler, supra*, 31 Cal.4th at p. 1127.)

We conclude that there is insufficient evidence to support the court’s finding of probable cause. The victim in the counts of which defendant was convicted reported only that defendant touched her with his hand through her clothes. She did not complain that he kissed her mouth or her body, or that he had skin-to-skin contact with any part of her body. Nor, according to the victim, did defendant ever bring his penis out of his pants. Since there is no suggestion that any bodily fluid at all was transmitted by defendant’s alleged actions, there are no

facts that would cause a reasonable person "to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV ha[d] been transferred from the defendant to the victim." (*Butler, supra*, 31 Cal.4th at p. 1127.) The People urge us to consider the reports by the two victims in the dismissed counts,³ but these also fail to indicate that any bodily fluid of defendant's was transferred to any victim: one victim reported that defendant touched the skin of her vagina with his hand multiple times, and the other complained he once digitally penetrated her.

The People cite *People v. Caird* (1998) 63 Cal.App.4th 578 in support of their contention the court's testing order was proper, but that case is distinguishable. The defendant in *Caird* was convicted of two counts of lewd acts upon a child (§ 288, subd. (a)), and one count of a forcible lewd act upon a child (§ 288, subd. (b)). (*Caird, supra*, at p. 581.) The appellate court upheld an HIV testing order pursuant to section 1202.1, based upon testimony of one of the victims that the defendant had gotten on top of her, had his penis between her thighs, and repeatedly tried to penetrate her. (*Caird, supra*, at p. 590.) The evidentiary showing here is very different, and

³ Defendant entered a *Harvey* waiver as to the dismissal of counts four through ten. (*People v. Harvey* (1979) 25 Cal.3d 754.)

significantly more meager, than the facts that supported the HIV testing order in *Caird*.

Since we have concluded that the court erred in entering the order requiring HIV testing under section 1202.1 because of the absence of a factual basis for its finding of probable cause, the remaining question is the appropriate remedy. Our state high court has held that, given important policy considerations, it is improper to simply strike an HIV order under the statute "without remanding for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause. . . . Given the serious health consequences of HIV infection, it would be unfair to both the victim and the public to permit evasion of the legislative directive if evidence exists to support a testing order. Accordingly, . . . it is appropriate to remand the matter for further proceedings at the election of the prosecution. [Citation.]" (*Butler, supra*, 31 Cal.4th at p. 1129.) Both sides acknowledge that this is the correct remedy.

DISPOSITION

The order that defendant undergo HIV testing is stricken, and the matter is remanded for the sole purpose of conducting further proceedings at the election of the prosecution to determine if there is sufficient evidence to support an order requiring HIV testing pursuant to Penal Code section 1202.1. In

all other respects, the judgment is affirmed.

SIMS, Acting P. J.

We concur:

RAYE, J.

CANTIL-SAKAUYE, J.